IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946-1947

No. 589

THE EBLING BREWING CO., INC.,
Petitioner,

against

PAUL A. PORTER, Price Administrator,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS AND BRIEF IN SUPPORT OF PETITION

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To the Honorable FRED M. VINSON, *the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Your Petitioner respectfully shows:

Summary Statement of Matter Involved

Petitioner seeks review by this Honorable Court of a judgment of the Emergency Court of Appeals sustaining, over the protest of petitioner, the validity of Maximum Price Regulation No. 259 (7 F. R. 8950); of Order No. 2

issued under said Regulation (R. 62) and of Revised Maximum Price Regulation No. 259 (9 F. R. 14537), all issued by the respondent, as Administrator of the Office of Price Administration, under the Emergency Price Control Act of 1942, as amended (U. S. C. A. Title 50, App. Sec. 901, *et seq.*), hereinafter throughout referred to as the "Act."

Pursuant to the provisions of said Act, petitioner heretofore filed two protests against said Regulations and Order with the Administrator. Said protests were both dismissed; and thereupon two complaints were filed, as provided by said Act, in the Emergency Court of Appeals. Said Court consolidated such proceedings and, after hearing, sustained the validity of said Regulations and Order and dismissed both complaints.

A writ of certiorari is sought pursuant to Section 204(d) of said Act.

In the proceedings below, petitioner urged (a) that the determination of the Administrator upon which said Order No. 2 was based was, upon the facts of the case, inconsistent with the provisions of said Maximum Price Regulation No. 259 and was thus an arbitrary act; (b) that, in any event, said Regulation was, in the respects hereinafter discussed, arbitrary, discriminatory and illegal and thus that said Order No. 2 issued thereunder was itself necessarily illegal and void; and (c) that said Revised Regulation which incorporated by reference the provisions of said Order No. 2 and which continued in effect most of the substantive provisions of the original Maximum Price Regulation No. 259 was also arbitrary, discriminatory and illegal. The Emergency Court of Appeals dismissed all three contentions.

Petitioner does not now seek a review of the question whether said Order No. 2 was consistent with the provisions of the Regulation pursuant to which it was issued. It seeks only a review of the determination of the validity of such

basic Regulations, as applied to the facts and circumstances involved herein; there being no substantial issues of fact in that regard.

(Maximum Price Regulation No. 259 was in effect at the time of the commencement of the protest proceedings below. Pending the determination thereof, the Revised Regulation which is still in effect was issued. Since such changes as were made in the original Regulation by the Revised Regulation do not affect the issues herein, both Regulations may properly be considered as one; accordingly, they will hereafter be referred to collectively as "the Regulation.")

Said Regulation is a "freeze" type of regulation in which maximum prices for the products covered thereby (malt beverages) are based upon the prices charged therefor by each seller during a "base period" (October 1-15, 1941 or March 1942, at the option of the seller) selected by the Price Administrator as a period which presumably would reflect the traditional competitive relationship between the members of the industry. (Certain specified increases, to reflect increased taxes, are permitted to be added to the base period prices.)

During its base period (October 1-15, 1941) petitioner, for many years the operator of a brewery in New York City, had produced and sold, in and around the New York Metropolitan marketing area, but one beer product, under the brand name "Ebling's Extra" (and to a very minor extent other malt beverage products). The prices charged therefor were substantially the same as those generally then prevailing for the sale of each of the similar popular-priced beer products then being produced by all of its competitors in that marketing area, there being thirteen substantial competitors therein, including petitioner (R. 33). This area, in respect to the sale of beer products, is a closely knit, highly competitive market. Each of the competitors therein competes with all of the others. Unlike the small retail merchant, no one of them has what may realistically be called a *closest* competitor (R. 116, 117).

During the same period, a substantial number of petitioner's competitors sold, in addition to their respective popular-priced beers which traditionally constituted the great bulk of their production, other beer products, under different brand names and at higher prices; such sales, however, represented at all times a relatively insignificant percentage of their total production and sales (R. 6, 34). As indicated, petitioner had never sold more than one brand (R. 41).

Shortly after the imposition of price control, after the March 1942 base period, such last-mentioned competitors all abandoned their popular, lower-priced brands and began to sell and have ever since sold only their higher-priced brands (R. 6, 34, 102). This practice was and still is not prohibited by the Regulation. It has, however, had the result that the prices of all such competitors for what now constitutes the bulk of their production are now, and since shortly after the imposition of price control have been, substantially higher than the prices charged by them as well as by petitioner during their respective base periods for the great bulk of their then production. This has been the situation in the New York area since early in 1943.

In June 1943, petitioner abandoned its said "Ebling's Extra" and shortly thereafter introduced a new product, under the brand name "Ebling's Special Brew Premium Beer"; and, in accordance with the then provisions of the Regulation, properly (R. 9) established its maximum price therefor at the prices then being charged by all of its competitors for their respective products (R. 33). These prices, which were identical as to all of such competitors, were of course higher than those formerly obtained for the "Ebling's Extra," as well as for the theretofore abandoned brands of petitioner's competitors. Such new brand has ever since and still is being sold by the petitioner; it is its only beer product.

There is no dispute in this case that in point of ingredients and quality generally, petitioner's new product was

and has always been at least the equal of those of its competitors (R. 110); and that in point of public acquaintance and consumer appeal, it was and is superior to that of several of its competitors (R. 90, 95).

In August 1943, after petitioner's new product had been on the market for approximately two months, the Price Administrator amended said Regulation (Amendment No. 2; 8 F. R. 10902) by the inclusion, among others, of a provision requiring petitioner to apply to the Office of Price Administration for authorization to maintain the price theretofore established for said "Ebling's Special Brew Premium Beer."

Petitioner made such application but thereafter, on November 19, 1943, the Administrator issued Order No. 2 under the Regulation, the effect of which was to require petitioner to abandon its price for such product and to revert to the substantially lower price formerly charged by it for "Ebling's Extra."

There is little question in this case that in point of ingredients and quality, the petitioner's new product differed from its old "Ebling's Extra" (R. 24, 106); there was some dispute (which issues of fact will not again be raised before this Court) as to whether the two products differed in other respects, such as advertising history, public acquaintance, etc.

The Court below properly held that, as interpreted by the Price Administrator, and as applied by him in connection with the issuance of said Order No. 2, the Regulation, in its present form (as amended by said Amendment No. 2), imposes what is commonly described as a "price line limitation" (Opinion, p. 11). Such a limitation is a provision frequently employed by the Office of Price Administration to the general effect that no new product of any seller may be sold at a price higher than the highest price charged by him for a product of the same kind

(*e. g.*, another beer product) during the base period, regardless of any changes or differences in quality, cost, public acquaintance, trade usage, advertising history or otherwise.

Accordingly, as the Regulation now stands, the petitioner will never be able to sell any beer product at a price higher than that charged by it during the base period (subject of course to such general percentage increases as may be afforded the entire industry by voluntary action of the Price Administrator).

The situation in which petitioner finds itself today, therefore, is that although its product "Ebling's Special Brew Premium Beer" is at least equal in quality to that of all of its competitors and is superior to that of several of its competitors in respect of public acquaintance, advertising history, sales volume, etc., it alone is and will continue to be burdened with prices much below those now generally prevailing in its market; although during the base period and for many years prior thereto, its product was sold at substantially the price generally prevailing for the great bulk of sales volume in that market.

A new seller, however, that is, one who produced no product at all during the base period, is and has always been entitled under the Regulation to adopt as the price for his newly-introduced product, regardless of its quality, consumer appeal, public acquaintance, etc., the then price of his "most closely competitive brewer," as defined by the Regulation. (The price which he may so acquire is subject only to certain overriding price limits specified in the Regulation which price limits purport to represent industrywide, base period average prices for beer products; even such prices, however, are for the most part higher than those now available to petitioner.)

In general, therefore, it is a strong probability that almost all newcomers to the industry will receive prices

higher than those now available to petitioner. And, in particular, so far as the New York Metropolitan Marketing Area is concerned, it is inevitable that any new seller coming into this market will receive prices higher than those now available to petitioner; for, by application of the definition of "most closely competitive brewer," several of petitioner's competitors, all of whose prices are higher than petitioner's, would be closer competitors of a newcomer than would the petitioner.

The sole question sought to be presented to this Court is the legality of a price regulation which, while "freezing" petitioner in the manner above indicated, nevertheless (a) permits its competitors to increase the prices of the bulk of their production and thus to alter the traditional base period competitive relationship between them and petitioner, and (b) permits any new seller coming into the New York Metropolitan Marketing Area to obtain higher prices than those afforded to petitioner.

Jurisdictional Statement

This Court has jurisdiction of this matter by virtue of the provisions of Section 204(d) of the Emergency Price Control Act of 1942, as amended (50 App., U. S. C. A., Sec. 924(d)); and Sec. 240 of the Judicial Code, as amended, 28 U. S. C. A., Sec. 347. The judgment of the Emergency Court of Appeals sought to be reviewed sustained the validity of Maximum Price Regulation No. 259 (7 F. R. 8950), of Order No. 2 thereunder and Revised Maximum Price Regulation No. 259 (9 F. R. 14537). Said judgment was entered on August 14, 1946. A petition for rehearing pursuant to Rule 27 of the Rules of the Emergency Court of Appeals (50 App., U. S. C. A., p. 403) was duly and timely filed by petitioner; such petition was denied by final order of said Court on September 9, 1946.

Questions Presented

1. Is a "freeze" type of maximum price regulation, embodying a "price line limitation" rule, unreasonably discriminatory against base period sellers producing and selling but one product, in a limited and highly competitive marketing area, when such Regulation permits new sellers, having no base period experience, to enter such marketing area and to obtain higher prices, for a not superior product, than those afforded to such established, base period sellers.

2. Is a "freeze" type of maximum price regulation, embodying a "price line limitation" rule, unreasonably discriminatory against members of an industry who, during the base period, produced and sold only one product at the then generally prevailing price, and in favor of other producers (competing with the former in a limited and highly competitive area) who each produced one product for sale at such prevailing price as well as other products which, while sold at higher prices, represented a relatively insignificant percentage of total sales, unless the Regulation, in addition to "freezing" the prices for all such products, also preserves the competitive relationship between all sellers in that marketing area by restricting such latter sellers from curtailing or discontinuing the sale of their lower-priced products and producing and selling only such higher-priced products.

Reasons Relied Upon for Allowance of Writ

By its decision, the Emergency Court of Appeals answered both such questions in the negative. Such decision is probably in conflict with applicable decisions of this Court. So far as petitioner is aware, neither of such questions has been finally decided by this Court. They both involve basic and substantial questions of federal constitutional Law—

relating to the due process and equal privileges requirements of the Fifth Amendment to the Constitution—which have not been and should be settled by this Court.

Both questions are of vital importance to the business world, not only in connection with the administration of the price control and stabilization program as it is now functioning, but also in connection with many other forms of governmental trade regulation.

The "freeze" technique of governmental trade regulation, by which the rights and obligations of individual business enterprises in a particular industry are fixed by reference to their respective prices and practices during a prior period which is supposed to reflect normal competitive relationships between members of that industry, is and has frequently been used by many government regulatory agencies; for example, the Office of Price Administration, the War Production Board, the Civilian Production Administration, Department of Agriculture.

It is a technique which assumes that the individual prices or other business practices so frozen would have continued to be maintained without such controls during periods of normalcy of supply and demand; and that the prices, practices and competitive relationships so frozen truly represent and would normally, in the absence of such controls, continue to represent the competitive relationships between members of the industry. It does not make allowance for the fact that changes in business practices and in competitive relationships are themselves normal developments over a period of time; and it does not attempt to permit "normalcy" in this sense.

The basic validity of this type of control has never yet been passed upon by this Court, so far as petitioner is aware.

The two questions specifically presented to this Court involve situations and problems which almost inevitably arise from application of the "freeze" type of control.

The first of these questions is whether, assuming the general validity in principle of this type of control, it remains valid notwithstanding that newcomers to the industry who have not had any base period experience are permitted an advantage, simply because they have had no such experience, over long-established merchants who have had base period experience and are thus frozen. And this question is one which becomes especially important after a "freeze" regulation has been in operation for a considerable period of time, when the impact of increasing numbers of newcomers has created a serious problem of competition.

The second of the two questions above stated is also of great importance in the administration of this type of control. Paraphrased simply, it is the question whether a *partial* "freeze," that is, one which freezes prices on individual products but does not prevent certain members of the industry from gaining over others a great competitive advantage which did not exist during the base period and would not exist during any normal period—by altering their traditional price lines in the manner above-described—is not inequitable and discriminatory.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Emergency Court of Appeals, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Emergency Court of Appeals had in the case numbered and entitled on its docket "Nos. 180 and 261 (Consolidated)—The Ebling Brewing Co., Inc., complainant, against Paul A. Porter, Price Administrator, respondent" to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States; that the judgment

herein of said Emergency Court of Appeals be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Dated: October 7, 1946.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinion Below

The opinion of the Emergency Court of Appeals is printed in full in the record (R.).

II

Jurisdiction

The jurisdiction of this Court is invoked under Section 204(d) of the Emergency Price Control Act of 1942, as

amended, and Section 240 of the Judicial Code. The Emergency Court of Appeals has in this case decided, in a manner probably in conflict with applicable decisions of this Court, important questions of federal constitutional law which have not been, but should be, settled by this Court.

Judgment was entered in this case by the Emergency Court of Appeals on August 14, 1946. A petition for rehearing, duly and timely filed by petitioner pursuant to the Rules of said Court, was denied by order thereof on September 9, 1946.

III

Statement of the Case

Petitioner does not seek review of the proceedings below in so far as they involved disputed issues of fact or issues relating to whether Order No. 2 issued by the respondent pursuant to Maximum Price Regulation No. 259, was consistent with the provisions of such Regulation.

Petitioner seeks only a review of those determinations of the Court below which dismissed the objections raised by petitioner to the Regulation itself, upon the validity of which the legality of said Order No. 2 must depend. In these respects, there are no substantial issues of fact; the questions raised may be determined solely upon consideration of the Regulation, as written, against the background of the relevant facts.

Insofar as they are necessary to a determination of the questions raised herein, the facts involved and proceedings heretofore had herein are set forth in the foregoing "Summary Statement of Matter Involved"; and such statement is adopted and made part hereof as if set forth here at length.

IV

Specification of Errors

The Court below erred in holding:

(a) that said Regulation was reasonable and not discriminatory notwithstanding that, while restricting petitioner to its 1941 price (plus the general increases heretofore mentioned) for its present or any future product, it nevertheless permits a new seller, one having had no previous experience or investment in the industry, to introduce into petitioner's market a new beer product, having no public acquaintance and regardless of its intrinsic cost or quality, and to receive as its maximum price therefor a price higher than that afforded to petitioner;

(b) that said Regulation was reasonable and not discriminatory notwithstanding that, while so "freezing" petitioner's price, it nevertheless permits its competitors to alter, in the manner above-described, the traditional competitive relationship between them and petitioner.

V

ARGUMENT

Summary of Argument

It is fundamental that due process of law requires equality of treatment by statute or governmental regulation for all persons similarly situated; that no greater burdens be laid upon one than are laid upon others in the same calling and condition; and that any regulatory classification of members of the same industry resulting in differing treatment must be reasonable and necessary to effectuate the purposes of such regulation.

Dent v. *West Virginia*, 129 U. S. 114;
Colgate v. *Harvey*, 296 U. S. 404.

A maximum price regulation which permits newcomers to an industry, who perform substantially the same service and sell substantially the same product (and even an inferior product) as old, established producers, to obtain higher prices for their product than are afforded to such old sellers does not satisfy such requirements and is therefore arbitrary, unreasonable and discriminatory.

The "freeze" technique of price control is justifiable, if at all, only upon the ground that the respective operations of members of the industry during the "base period" form a reasonable basis for classification. Consequently, it may be said to be a valid technique, if valid at all, only if the Regulation employing it is actually and completely a "freeze" regulation in that it effectually preserves and perpetuates all of the relationships which had been developed by and among the members of the industry during the base period which the Regulation purports to reflect.

Perpetuation of such relationships involves more than merely "freezing" prices; it involves, also, the perpetuation of normal relationships so far as production is concerned. Where, during the base period, some members of the industry produced and sold only one product at the then generally prevailing price while others produced two or more products—one which represented the great bulk of their production and was also sold at the generally prevailing price, and other products which, while representing a relatively insignificant percentage of total sales, brought higher prices—the applicable Regulation cannot be said to constitute a proper application of the "freeze" technique unless it also curtails sales of such higher-priced products so as actually to preserve the base period relationship between the members of the industry with respect to their volume of sales made at varying price lines.

POINT A

The Regulation, as written and interpreted by the Price Administrator, is and has at all times been discriminatory against petitioner (and others similarly situated who were in operation during the base period) in favor of other brewers who were not in business during the base period.

The Court below, on page 11 of its opinion, held that the Regulation imposes a price line limitation and sustained the Administrator's authority so to do (R.).

We do not now question that holding. But the effect of it is that the petitioner will never receive more than its base period (1941) price (plus taxes and such general percentage increases as may be afforded the entire industry) for its present product or for any other product it may hereafter produce, no matter how superior to, or how much more costly or desirable it may be than either its own existing product or any theretofore produced by it or that of any of its competitors.

A new seller, introducing a new product in direct competition with petitioner's, is permitted to price his product under Section 2.6 of the Regulation. This section fixes his price at the price of his "most closely competitive brewer"; but no higher than the prices specified in Table III of the Regulation. These latter prices, however, while below those of all of petitioner's competitors, are nevertheless, for the most part, higher than those afforded to petitioner.

Therefore, unless the Regulation requires a new seller to regard the petitioner, rather than any of the other producers in its market, as his closest competitor, he will be entitled to a price higher than those now available to peti-

tioner; for each of such twelve other competitors are now selling at such higher prices. This, however, the Regulation does not require.

On the contrary, by application of the definition of "most closely competitive brewer," as set forth in the Regulation, it is a virtual certainty that the newcomer's closest competitor will be one other than petitioner. This definition is as follows:

> "Determination of a brewer's 'most closely competitive brewer' shall be made by reference to (but is not limited to) consideration of whether the two brewers:
>
> (1) are comparable in size and production capacity;
>
> (2) sell the same type of domestic malt beverage in the same price line;
>
> (3) sell domestic malt beverages with comparable advertising history and public acquaintance;
>
> (4) are competitive in their sales of domestic malt beverages;
>
> (5) are located in geographical proximity.
>
> Where more than one brewer satisfies the tests, the one located nearest to the brewer seeking to establish a price shall be used."

Since all sellers in this marketing area are in geographical proximity and are competitive, comparability of size and capacity and comparability of advertising history and public acquaintance would be the only and conclusive tests. (All competitors would be selling the same type of domestic malt beverage (beer) and, of course, the "price line," since that is what is being determined, could not be a test.)

At least four of petitioner's competitors (Piel's, Trommer's, Edelbrau and Pilser) are smaller in size and pro-

duction capacity than petitioner (R. 116); and at least two of its competitors (Eichler and Ehret) are inferior in point of advertising history and public acquaintance (R. 90, 95).

It is clear from the record that, in the making of any such determination, the latter test, that is, advertising history and public acquaintance, would be regarded by the Administrator as the paramount test (R. 25, Opinion, p. 10). (And it is noteworthy, in this connection, that this method of pricing may be adopted by any seller in the exercise of his own judgment and without prior approval by the O. P. A.)

Any new seller coming into this market at this time would almost surely be smaller in size and production capacity than petitioner; and its advertising history and public acquaintance, which would necessarily be non-existent, would of course be inferior to that of petitioner. Consequently, it is a practical certainty (and not "pure assumption" as the Court below stated) that any such new seller would be entitled to adopt as its price the price of any one of the six competitors of petitioner above-mentioned, all of which enjoy higher prices than petitioner. (This would, of course, be subject to the overriding limit of the Table III prices; but even these are higher than that of petitioner.)

The "competitive pricing" technique frequently adopted by the O. P. A., pursuant to which a new seller is permitted to price by reference to his most closely competitive seller, may be reasonable in the ordinary situation—especially with respect to retailers—where the new seller competes almost exclusively with the seller whose price he adopts. In such situations, the established seller is not injured, because his new competitor has been given no higher a price than is available to him. In the case of a product and a market such as the one we are here concerned with, however, the situation is quite different. It cannot here be said that a new seller, having established his price by reference to his "most closely competitive brewer" will thereupon compete solely, or almost exclusively with that competitor.

He will, in fact, compete with all other sellers in this area just as intensively; his operations will affect all of them.

There is no reason of administrative convenience why provision could not have been made in this Regulation (as the O. P. A. has done in many of its other regulations) permitting old established sellers in situations like these to receive at least as equitable treatment as is afforded to new sellers with no previous experience or investment in the industry; surely there is no reason why newcomers should be given any advantage over established merchants. It is important to keep in mind, in this connection, that we are dealing here not with only one of a great number of products sold by one seller, as to which one product it might be argued that administrative convenience makes impossible and thus unnecessary nicety of treatment. We are, on the contrary, dealing with one product which is the entire business of the seller.

POINT B

The Regulation is and at all times has been discriminatory as against petitioner (and all other brewers who sold only one beer product during the base period) and in favor of other brewers who sold more than one such brand at varying prices.

Almost all brewers, including those in petitioner's marketing area, who, during the base period, sold more than one brand of beer at varying prices, have long since abandoned their lower-priced brands and are now selling only their highest-priced brands. The price now permitted to petitioner is substantially the same as those charged, during the base period, by its competitors for the then bulk of their production, namely, their lower-priced products; they have now been abandoned in favor of their highest-priced products which formerly constituted a very small part of their total production.

The Court below has itself repeatedly emphasized that fairness and equality of treatment require not only that members of an industry be subjected to substantially equal burdens but that they be permitted equal opportunity to develop their respective businesses in the same manner.

Thus, as that Court said in *Hawaii Brewing Corporation, Ltd.* v. *Bowles,* 148 Fed. (2) 846, at page 850:

> "It is essential to fair treatment that all persons who are similarly situated be dealt with upon an equal basis; that no greater burdens be laid upon one than are laid upon others in the same calling and condition. *Consolidated Water Power and Paper Co.* v. *Bowles,* 146 F. 2d 492 (E. C. A. 1944); *Pfeiffer Brewing Co.* v. *Bowles,* 146 F. 2d 1006 (E. C. A. 1945). We applied this test in *Consolidated Water Power and Paper Co.* v. *Bowles, supra,* and *Flett* v. *Bowles, supra,* finding price regulations invalid because they subjected the complainants to competitive handicaps not characteristic of the industry prior to price control. We see no reason for deviating from that reasoning."

And particularly as to the "freeze" type of regulation, that Court indicated in *Pfeiffer Brewing Co.* v. *Bowles,* 146 Fed. (2) 1006, at page 1008, that the essential rationale, in fact the only legal justification, for a "freeze" regulation is that it

> "perpetuates the status and the relationship which had been developed by the members of the industry in the open market" (as of the applicable base period).

Unless this type of regulation does in fact operate in this manner, it cannot be justified and must be regarded as arbitrary and discriminatory. Perpetuation of such status and relationship involves more than merely "freezing" particular prices for particular products; it must "freeze" the true competitive relationship between the sellers in all of its aspects.

The discrimination existing in the situation first above described is demonstrable by the following illustration (the figures used are arbitrary).

Assume that, during the base period, petitioner which had never sold more than one brand had sold it at $1.50 per unit; and that its competitors had sold three brands, at the following prices, each brand representing that percentage of its total production which is indicated.

Brand A—$1.50—85% of total production
Brand B—$1.75—10% " " "
Brand C—$2.00— 5% " " "

It thus appears that the normal base period relationship between petitioner and its competitors was that, as to the great bulk of their business they were each receiving the same price. For all practical purposes, they were competing for the sale of a product to sell for $1.50. They were brewers of the same class, doing business in substantially the same way.

Today, however, as permitted by the Regulation, these competitors are selling *all* of their production at $2.00; but petitioner is frozen to its $1.50 price. That has the effect of altering the normal relationship between petitioner and its competitors as effectively as if its competitors had been permitted a price increase from $1.50 to $2.00; for, whereas during the base period each of such competitors was selling the bulk of its production at $1.50, it is now selling that same production at $2.00.

Assuming the validity of this illustration—and apparently the Court below did make such an assumption—it is difficult to see how it arrived at its conclusion (Opinion, p. 12) that "the base period competitive relationship existing between complainant's beer and so-called "premium" beers (the higher-priced beers) of other brewers is preserved in the Regulation."

In this connection the Court below also made the following statement (Opinion, p. 12):

> "The position in which complainant finds itself results from the fact that, in the base period prior to price control, complainant had priced its beer lower than the generally prevailing prices."

It is true that the price received by petitioner for its product during the base period was below the prices *now* (and for some time *since* price control) generally prevailing; but this is because the prices now prevailing are those of the more expensive lines of its competitors which during the base period represented only a small percentage of their business. During the base period, petitioner's price was substantially the *same* as those then being charged by its competitors for what was then the great bulk of their production. During the base period, those were the "generally prevailing prices"; it was not until after price control that the generally prevailing prices became the prices formerly charged for only a very small portion of the total production in this marketing area.

Thus, the discriminatory position in which petitioner finds itself results, not from the competitive relationship which existed between it and its competitors during the base period but from the fact that the Regulation makes no provision for assuring that such relationship be preserved; it has not in fact been preserved.

The petitioner is being denied the same opportunity for the development of its business as is afforded to its competitors; for while the Regulation has the effect of "freezing" petitioner, it does not also "freeze" its competitors. It does not, therefore, afford equal treatment to all persons subject to it.

Petitioner is entitled to a Regulation which, in accordance with a proper application of the "freeze" technique of price control, maintains its normal competitive relation-

ship. This should have been accomplished in this case in one of two ways—either by permitting petitioner to increase its own price or by requiring its competitors to maintain their normal production and sales practices.

In discussing this contention, the Court below stated that (Opinion, p. 12):

> "Complainant's contention comes down to this: that a freeze type of regulation is invalid as against a manufacturer caught with a low base period price, unless the regulation contains something akin to a 'maximum average price' limitation under which his multiple-brand competitors would be permitted to produce at a particular price line only that percentage of their sales which was equal to the percentage of that price line produced during the base period. We find nothing in the Act which would point to such a conclusion."

As we pointed out in our petition for rehearing to that Court, whether such provision should have been made by a "maximum average price" limitation or by some other appropriate device is, we submit, a secondary consideration, a matter of practical detail. It was our contention that unless and until some appropriate provision, of whatever nature, be made to the end of assuring that such normalcy of production be preserved, the Regulation operates discriminatorily against petitioner. A "maximum average price" rule was suggested as one possible device which might have been employed; any number of other such devices could have been suggested.

In dismissing this contention, the Court below, while indicating that the suggested regulation of the production of petitioner's competitors might have been desirable, stated (a) that there was nothing in the Act which required that the Administrator take such action and (b) that, in any event, by amendment to the Act effective July 1, 1946, the Administrator was prohibited from issuing or enforcing any "maximum average price" regulation.

It is true that the Act has never specifically required the Administrator to adopt a "maximum average price" regulation or any other particular device to that end. But the Act does provide that no regulation shall be issued unless it is fair and equitable; and the Emergency Court of Appeals is therein specifically directed to set aside any regulation which "is not in accordance with law, or is arbitrary or capricious" (Sec. 204(b); 50, App. U. S. C. A., Sec. 924(b)). It is implicit in the Act, therefore, that the Administrator may issue no regulation unless he is empowered to do and has done whatever may be necessary to render it fair and equitable and otherwise in accordance with law.

Moreover, the newly-introduced provision prohibiting "maximum average price" rules was not in effect until after this matter had been finally submitted to the Court below. As indicated in the proceedings below, the petitioner sought a determination that the Regulation was invalid not only at the present time but also at all times since its issuance; since the petitioner is now involved in enforcement proceedings in connection with which such retroactive determination is vital. During the entire period of the effectiveness of the Regulation, until July 1, 1946, the Administrator was fully empowered to introduce a "maximum average price" limitation; and he had done so in connection with other regulations under which similar problems had arisen. Thus, the inability of the Administrator to make such provision at this time can have no effect upon the validity of the Regulation at a time when he was fully authorized to do so.

CONCLUSION

It is respectfully submitted that the Court below was in error in dismissing petitioner's complaints and that its judgment should be reversed. The issues herein are substantial and involve a form of governmental control which, because of the frequency of its exercise, is of great public

interest. They are of such a character that the ultimate rule by which federal administrative agencies empowered to exercise such controls are to be guided, should be announced by this Court in the exercise of its supervisory powers. It is respectfully submitted, therefore, that a writ of certiorari should issue.

Respectfully submitted,

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